

# 13-4206 (L)

## 13-4323 (CON)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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U.S. COMMODITY FUTURES TRADING COMMISSION,  
Plaintiff-Appellee,

v.

PARNON ENERGY INC., ARCADIA PETROLEUM LTD., ARCADIA  
ENERGY (SUISSE) SA, NICHOLAS J. WILDGOOSE, JAMES T. DYER,  
Defendants-Appellees,

v.

MORGAN STANLEY CAPITAL GROUP, INC. and SHELL OIL COMPANY,  
Objectors-Appellants.

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On Appeal from the United States District Court for the Southern District of New  
York, No. 11-Civ.-3543, the Hon. William H. Pauley III, U.S. District Court Judge

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**APPELLANT MORGAN STANLEY CAPITAL GROUP, INC.'S JOINDER  
IN BRIEF OF APPELLANT PLAINS ALL AMERICAN PIPELINE, L.P.**

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December 23, 2013

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, appellant Morgan Stanley Capital Group, Inc. states that it is a wholly-owned subsidiary of Morgan Stanley, a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1 Marunouchi 2-chome, Chiyoda-Ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

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**JOINDER**

Appellant Morgan Stanley Capital Group, Inc. (“Morgan Stanley”) respectfully joins in the brief of Plains All American Pipeline, LP’s (Plains’ Brief, 2<sup>nd</sup> Circuit Case No. 13-4206, Rec. D. 138) (Plains’ Brief, 2<sup>nd</sup> Circuit Case No. 13-4323, Rec. D. 108) and hereby adopts and incorporates the jurisdictional statement, factual recitation and legal arguments and authorities set forth therein.

Morgan Stanley produced a wide range of documents containing proprietary and confidential business information to the U.S. Commodity Futures Trading Commission (“CFTC”) in connection with the CFTC’s non-public review of the **national** crude oil markets in the United States for the period covering **2007 and 2008**. *See* JA136 (Case No. 11-cv-3543, Dkt. No. 94, Objections of Morgan Stanley (“Morgan Stanley Objections”) at 2). The documents Morgan Stanley produced to the CFTC included detailed and highly confidential records pertaining to its commodity trading business. Accordingly, Morgan Stanley requested confidential treatment for those documents under the Freedom of Information Act pursuant to CFTC Rule 145.9, 17 C.F.R. § 145.9. *See* JA136 (Morgan Stanley Objections at 2.) The CFTC’s requests to Morgan Stanley, and the documents Morgan Stanley produced in response were not limited to the 6 months at issue in the CFTC’s action against the Defendants-Appellees, and they were not confined to the specific grade of crude oil at the particular trading hub at issue in the CFTC

action. *See* JA140 (Morgan Stanley Objections at 6.). Nonetheless, Morgan Stanley understands that the CFTC produced at least some of those documents to the Defendants-Appellees. *See* JA137 (Morgan Stanley Objections at 3). Morgan Stanley further understands that many of its documents were produced without any review of the documents by the CFTC, much less a relevancy determination. *See, e.g.,* JA155 (Case No. 11-cv-3543, Dkt. No. 104, CFTC’s Response to Objections by Third Parties at 7) (stating that relevant documents of Morgan Stanley and other non-party objectors were housed by the Commission in 46 different databases and consisted of nearly six million documents); No. 11-cv-3600, Dkt. 147, at 51:22-25 (available at JA235 in No. 13-4263 Joint Appendix) (stating that “hundreds or tens of thousands of [nonparty] audio” recordings were produced to Defendants-Appellees without review). These same documents produced to the Defendants-Appellees by the CFTC are now the subject of a document request from the plaintiffs in a related putative class action. *See* JA137 (Morgan Stanley Objections at 3).

For the reasons articulated in the Plains Brief to which Morgan Stanley joins and as set forth herein:

- The scope of the documents Morgan Stanley produced to the CFTC as part of the agency’s national crude oil investigation were broader in time and subject matter than the scope of the CFTC’s allegations against the Defendants-Appellees in the CFTC’s enforcement action.

- Morgan Stanley understands that the CFTC produced documents to the Defendants-Appellees, in some instances, without any review whatsoever of the documents because of the sheer volume of the information.
- These same documents are now being produced by the Defendants-Appellees to the Plaintiffs in a related class action, again without review for relevance. *See* Case No. 11-cv-3543 (S.D.N.Y.) (“Class Action”).
- In response to Morgan Stanley’s objections, the district court ordered the further production of Morgan Stanley’s documents, notwithstanding the absence of any showing of relevance by (i) the CFTC, (ii) the Defendants-Appellees or (iii) the Plaintiffs in the Class Action, in contradiction of the express requirements of the federal rules of civil procedure.
- The district court therefore abused its discretion where its conclusion was based on an erroneous determination of law.

Respectfully submitted,

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**STATEMENT CONCERNING ORAL ARGUMENT**

Counsel for Appellant Morgan Stanley Capital Group, Inc. request oral argument.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 646 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s Anthony M. Mansfield  
*Attorney for Appellant*  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on December 23, 2013, I electronically filed the above Joinder in the Brief of Plains' All American Pipeline LP with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

*/s/ Anthony M. Mansfield*  

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